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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JEFFREY LYNN BUCHER, Defendant and Appellant.	G051194 (Super. Ct. No. 13HF2134) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Vickie L. Hix, Commissioner. Reversed in part and remanded with directions.

Richard Schwartzberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Stacy Tyler, Deputy Attorneys General, for Plaintiff and Respondent.

Jeffrey Lynn Bucher appeals from an order granting his petition for resentencing under Proposition 47. Although he is satisfied with the trial court's reduction of his felony convictions to misdemeanors, he argues the court erred by failing to apply his excess custody credits to reduce his parole period.

Appellate courts have split on this issue and it is now pending before our Supreme Court. (Compare *People v. Morales* (2015) 238 Cal.App.4th 42, review granted Aug. 26, 2015, S228030 and *People v. Armogeda* (2015) 240 Cal.App.4th 1039, review granted Dec. 9, 2015, S230374 [concluding that excess custody credits reduce the parole period] with *People v. Hickman* (2015) 237 Cal.App.4th 984, review granted Aug. 26, 2015, S227964 and *People v. McCoy* (2015) 239 Cal.App.4th 431, review granted Oct. 14, 2015, S229296 [concluding that excess custody credits do not reduce the parole period].)

We agree with appellant and consequently reverse the order in part and remand the case to the trial court with directions to apply his excess custody credits against his parole period.

FACTS

In 2013, appellant was charged with counts alleging felony possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)) and misdemeanor possession of drug paraphernalia. (Former Health & Saf. Code, § 11364.1, repealed by Stats. 2014, ch. 331, § 9.) The complaint also alleged he had suffered a prior "strike" (Pen. Code, § 667, subds. (d)-(i)) and four prior felony convictions resulting in imprisonment. (Pen. Code, § 667.5, subd. (b).) Appellant pleaded guilty and the court struck his priors. He was sentenced to prison for the lower term of 16 months, and given credit for 258 days of time served, including 129 of actual custody time and 129 days of good conduct.

In December 2014, appellant filed a petition to reduce his felony conviction for possession of a controlled substance to a misdemeanor pursuant to Penal Code section 1170.18, which had been passed as part of Proposition 47. The trial court granted the motion, and resentenced appellant to 365 days in jail, with credits of 365 days. The court then ordered appellant to serve parole pursuant to Penal Code section 1170.18, subdivision (d).

DISCUSSION

Appellant contends the court erred by placing him on parole because between the date of his sentencing in October 2013 and the date his petition was granted in December 2014, he had been in custody for 424 days (73 days in 2013 and 351 in 2014.) Thus, after the court gave him credit for 365 days against his 365-day jail term, he had excess credits remaining, which should have been applied to reduce or eliminate his parole term. (Pen. Code, §§ 1170, subd. (a)(3), 2900.5; *In re Smith* (2007) 150 Cal.App.4th 451, 458-459.)

The Attorney General counters that appellant waived any objection to the court's failure to apply excess credits when he "acquiesced" in the trial court's "calculation" that he had only 365 custody credits, consisting of 183 days actually served plus 182 days of conduct credit. We reject the claim. The court did not engage in any calculation. Instead, it simply announced it was applying 365 days of credits so that appellant's new 365 day sentence was "deemed served." *People v. Myers* (1999) 69 Cal.App.4th 305, 312, which the Attorney General cites in favor of its waiver argument, is distinguishable. In that case, the court found a waiver where the defendant entered into a *stipulation* with the prosecutor as to the number of custody credits he was entitled to, and the trial court's award was made pursuant to that stipulation. No such stipulation was reached here.

The Attorney General next argues that appellant cannot be excused from serving a parole term, no matter how many custody credits he may have, because the statute under which he was resentenced, Penal Code section 1170.18 (section 1170.18), states "[a] person who is resentenced pursuant to subdivision (b) shall be given credit for time served and shall be subject to parole for one year following completion of his or her sentence, unless the court, in its discretion, as part of its resentencing order, releases the person from parole." (§ 1170.18, subd. (d).) We cannot agree.

On appeal, we interpret statutes de novo (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562), including statutes added to the Penal Code by the passage of a ballot initiative (*People v. Park* (2013) 56 Cal.4th 782, 796). Moreover, we concur with the Attorney General's assertion that "courts should give meaning to every word of a statute if possible." (See *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 22.) However, in our view that assertion does not aid the Attorney General's position here. Subdivision (d) of section 1170.18 does not actually require that a person who is resentenced must *serve* a one-year term of parole following completion of his or her sentence; it merely states that the person shall be *subject to* parole. Further, in passing Proposition 47, the electorate expressly directed both that resentenced defendants "shall be given credit for time served" (§ 1170.18, subd. (d)) *and* that they are entitled to "any rights or remedies otherwise available" (§ 1170.18, subd. (m)). In our view, this express language means the excess custody credits for time served that are usually available to felons under existing law (Pen. Code, § 2900.5) are also available to defendants resentenced under Proposition 47.

The Attorney General also argues that allowing excess custody credits to be used in a manner that excuses the person resentenced from actually serving a period of parole would be inconsistent with the intention of the electorate in passing Proposition 47. Again, we disagree. It is well settled that "[w]e must assume that the voters had in mind existing law when they enacted [a] Proposition." (*People v. Woodhead* (1987) 43

Cal.3d 1002, 1012.) And under then existing (and still current) law, even those persons convicted of more serious – even violent – felonies were entitled to have excess custody credits applied to reduce or eliminate a period of parole. (Pen. Code, § 2900.5, subd. (c).) It makes little sense that the very electorate which, by voting for Proposition 47, was agreeing to reduce certain lesser felonies to misdemeanor status would also intend to impose a *more stringent* parole requirement on the persons previously convicted of those lesser felonies than the law otherwise required for persons who had committed more serious felonies. And we do not believe they did. To the contrary, the electorate expressly required that the persons whose felonies were reclassified as misdemeanors would retain all "otherwise available" remedies. (§ 1170.18, subd. (m).)

Finally, the Attorney General suggests that construing subdivision (d) of section 1170.18 in the manner we do would lead to an "absurdity" because "the worse the offender's criminal history or current crime, and therefore the longer the prison sentence he was serving, the likelier he would be to have enough conduct credits to avoid the year of parole. In other words, the more culpable the criminal, the shorter the parole period." The argument is a red herring. As we have already noted, none of the offenders who are resentenced pursuant to section 1170.18 are as culpable as the more serious felony offenders who are not even eligible for relief under the statute. And those more serious felony offenders remain eligible to offset excess custody credits against a period of parole. Moreover, it is safe to assume the most salient factor determining whether an offender accumulated excessive custody credits while serving a (formerly) felony sentence is not his or her culpability, but rather *the period of time* between the date he or she was originally sentenced to the felony term and the date of resentencing under section 1170.18. The earlier an offender was given the original felony sentence, the more time he or she will have had to accumulate excess credits against the subsequently imposed misdemeanor term. Stated simply, there are no felony sentences – no matter how relatively innocuous the crime might seem – which would not be sufficient to offset a

misdemeanor term with at least a year to spare, if the offender had already served the majority of the felony term before being resentenced.

For all of the foregoing reasons, it remains this court's unanimous view that excess custody credits must be applied to offset a term of parole when a person is resentenced to a misdemeanor term pursuant to section 1170.18.

DISPOSITION

The resentencing order is affirmed except to the extent it fails to consider appellant's excess custody credits in determining the length of his parole. The matter is remanded with instructions to recalculate appellant's parole period consistently with this opinion.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

MOORE, J.

THOMPSON, J.